Body Corporate & Community Management & Other Legislation Amendment Bill 2012 Submission 006

From: Lynton Rose
To: Legal Affairs and Community Safety Committee
Subject: Submission relating to the Body Corporate and Community Management and Other Legislation Amendment Bill 2012
Date: Wednesday, 26 September 2012 11:39:06 AM

The Research Director
Legal Affairs and Community Safety Committee
Parliament House
George Street
BRISBANE QLD 4000

Re: Body Corporate and Community Management and Other legislation Amendment Bill 2012.

Dear Sir / Ma'am,

What the April 2011 amendments did, was revert Community Management Statements (CMS's) to the bad calculations of Lot Entitlements prior to the 1997 BCCM legislation.

The change in CMS's that some were unhappy with, was a result of those CMS's being brought into compliance, via the Courts or Specialist Adjudicators, with the 1997 BCCM legislation, whereby all lot owners had to be treated equally, unless it was inequitable to do so. It was these actions (to make CMS's comply with the law) that became the catalyst for the April 2011 amendments.

The changes in accordance with 1997 legislation meant that each owner paid an equal share of the fire detection services, elevator maintenance, garden maintenance, cleaning of common areas, on site management fees, pool maintenance, secretarial service fees. water usage (remember, most of these older buildings do not have water meters) and so on for the various items of management, repairs and maintenance incurred in the operation of the building. The 1997 legislation introduced what we now call the "Equality Principle"

When it came to water usage and external painting, those apartments that had larger external surfaces or multiple bathrooms / bedrooms (bigger units, penthouses etc) paid proportionally more. The calculation of these various amounts were calculated by experts in this area of work and presented to the Court or Specialist Adjudicator for approval at the time of the application for the change to comply with the 1997 BCCM legislation. This type of calculation is referred to in the April 2011 amendment as the Equality Principle and is still valid.

The change mentioned above to comply with the 1997 BCCM legislation meant that generally speaking, smaller apartments paid a little more as prior to the 1997 BCCM legislation most Lot entitlements were calculated on the area (thus in most cases - value) of the apartment, (this method of calculation is now referred to as the "Relativity Principle") unless the developer wanted to look after himself or his mates by artificially lowering the number of Lot Entitlements for the Penthouse or Sub penthouses thus increasing the proportion of costs to smaller apartments. This is the rort that was stamped out by the 1997 BCCM legislation. And in case the developer still got it wrong, the Act had appeal provisions to allow owners to make the necessary changes in the future. This type of calculation prior to 1997 is referred to in the April 2011 amendment as the Relativity Principle and is still valid.

The difference between the Equality Principle and the Relativity Principle is that the latter takes into account the dollar value of the apartment. Or in other words, by using the

Relativity Principle, a lot owner pays maintenance not by equal and equitable share, but effectively by a tax on the value of the apartment. There is nothing in the legislation to guide the developer as how to "value" the apartment. Nor is there anything in the legislation to consider ongoing and changing values. This "Relativity Principle" is extremely undesirable.

The April 2011 Amendment allowed for the developer to arbitrarily use either of the principles which were specifically created in the amendment (Equality or Relativity) and apply it in a CMS and the CMS is to state which principle has been applied. The 2011 Amendment has no appeal provision to replace one principle with the other, should lot owners in the future wish to do so. The most lot owners can do is move the number of Lot Entitlements around in the same principle. This applies only to CMS's that were created after the April 2011 amendments and is still valid.

Those CMS's that were created prior to the April 2011 amendments have had the appeal provisions removed and this is still valid.

I personally reject the view that the developer can summarily make a judgment and that cannot be appealed by lot owners in the future.

So you may ask, what is the difference between the legislation before and after the April 2011 amendments, other than the forced reversion of the Lot entitlements?

The difference is this, and is still valid;

The developer now has a choice to have the CMS comply to the Equality Principle (same as the 1997 legislation) or the Relatively Principle (effectively the same as the legislation prior to 1997). The Relativity Principle seeks to add the "value" of the apartment into the calculation of the Lot Entitlements.

All Lot owners with CMS's created prior to April 2011 amendments now have no appeal rights to change the Lot entitlements.

All Lot owners with CMS's created after the April 2011 have appeal rights to change the Lot entitlements within the selected "Principle" but have no appeal against the selection of the "Principle" by the developer.

The 2012 amendment.

This has put a stop to the reversion process that was created by the April 2011 amendment and it has allowed for those CMS's that were changed by the Court or Specialist Adjudicator as a result if the 1997 BCCM legislation to be restored to their former position, **though the timing and procedure provided for in the 2012 amendment needs to be tightened up and simplified with a short time frame and emphasis on the necessity of a Body Corp committee to act with the minimum of delay to restore the provisions of the previous CMS.**

The amendment provisions need to go further by removing the Relativity Principle entirely and to restore appeal provisions for Lot owners with CMS's created both prior to and after the April 2011 amendments.

Generally.

Overall the 1997 legislation was good legislation as it treated everyone equally and equitably, had appeal provisions if the developer got it wrong in allocating Lot entitlements. The 2012 amendment legislation needs in simple terms, to restore the 1997

legislation regarding Lot entitlements and appeal provisions.

I have a case at the moment whereby a major developer created a complex with a tiered system of a Principle Body Corp and two Sub Body Corps. One sub body corp as 27 apartments and the other nine. This is a 75% - 25% split, yet the Lot entitlements are allocated 53% - 47%, thus the owners in the smaller sub body corp are heavily subsidizing the larger sub body corp. When it comes to the Interest entitlements (which govern how the insurance on the complex is paid) the split is 57% - 43%. That is, the sub body corp with the 27 apartments are the 57%, but, the valuation for insurance purposes (does not include land) has the 27 apartments valued at $40M and the nine apartments at $20M (total $60M) meaning that the smaller body corp with the nine apartments subsidize the 27 apartments when paying the premium, yet the insurance valuation has the split closer to 66% - 34%. But here is the serious part; in case of total loss, the payout out of $60m would give the nine apartments about $29M and the 27 apartments $31m which in fact should be $20M and $40M respectively. This is a good example where the developer gets it wrong and why appeal provisions are necessary. In this case, it was a major listed public company that was the developer.

The abovementioned case cannot be brought before the Court because the appeal provisions have been removed by the April 2011 amendment.

So you can see there is need to have appeal provisions. The fact is that with deep analysis, the 1997 BCCM legislation proves to be good and should have not been altered the way is was by the April 2011 amendments and most commentators and law bodies recognised that point (read their submissions back in April 2011). What could have happened is that it could have been strengthened by Regulation by stating (in tabulated form) what expenditure items were to be share equally and what were to be shares equitably.

Example.

Expense	Distribution	Calculation
Manager Fees	Equal	
Pool R&M	Equal	
External Paint	Equitable	Area of external wall per apartment / common areas
Water usage	Equitable	Number of bedrooms
Garden R&M	Equal	

The changes that took place since the 1997 BCCM legislation did not just in some cases, increase body corp fees to some owners, it also corrected the mates rates calculations and above all , it instilled fairness and equity for every owner, even though some that got increases failed to understand why.

There are plenty of penthouses that have their own BBQ area and swimming pools, but the penthouse owner gets no relief from paying their proper share of the common BBQ and pool areas maintenance, nor should they, but it is equally not fair that simply because one owns a larger unit one should pay more for the manager or garden maintenance and the like.

Regards,

Lynton W Rose

Lynton W Rose
Chairman

Motorline BMW | Motorline MINI Garage | Motorline Motorrad
Phone: (07) 3290 7000 | Fax: (07) 3290 7077 | Mobile:
Exit 23 (Southbound) Exit 24 (Northbound), Pacific Motorway, Daisy Hill QLD 4127
www.motorline.com.au